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Supreme Court, U.S.
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No. 97-1230

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1997

CITY OF WEST COVINA,
Petitioner,

vs.

LAWRENCE PERKINS; CLARA PERKINS;
APRIL PERKINS, a minor, by and through
LAWRENCE PERKINS,
Respondents.

On Writ Of Certiorari To The United States
Court Of Appeals For The Ninth Circuit

PETITIONER'S BRIEF ON THE MERITS

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QUESTIONS PRESENTED

1. Whether the procedural component of the Fourteenth Amendment's Due Process Clause requires a police department to provide legal advice and guidance concerning how to pursue *postdeprivation* judicial remedies for the return of property seized during the execution of a search warrant.

2. Where *postdeprivation* judicial remedies for return of property seized pursuant to a search warrant are held to be adequate to meet the due process requirements, whether *Parratt v. Taylor*, 451 U.S. 527, 101 S. Ct. 1908, 68 L. Ed. 2d 420 (1981) and *Hudson v. Palmer*, 468 U.S. 517, 104 S. Ct. 3194, 82 L. Ed. 2d 393 (1984) require police officers to notify claimants of the availability of those judicial remedies should they wish to claim their property.

PARTIES

The parties are Petitioner/Defendant City of West Covina and Respondents/Plaintiffs Lawrence Perkins, Clara Perkins and April Perkins, a minor, by and through Lawrence Perkins.[1]

[1] Other defendants who are not parties to this Petition include detectives Michael Ferrari, David Melny. Dario Aldecoa, James O'Brien, Dan Nalian and Wayne Heieck, Lieutenant John Schimanski and the County of Los Angeles.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES ii

OPINION 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS

STATEMENT OF THE CASE 3

A. Procedural History Of The Litigation In The District Court And Summary Of The Ninth Circuit's Opinion 3

B. Summary Of The Evidence 7

SUMMARY OF THE ARGUMENT 10

ARGUMENT 14

I. THE COURT OF APPEALS ERRONEOUSLY CREATED A NEW *NOTICE* REQUIREMENT IN *POSTDEPRIVATION* PROCEDURAL DUE PROCESS CASES IN A MANNER THAT CONFLICTS WITH THIS COURT'S DECISIONS AND DECISIONS IN OTHER CIRCUIT COURTS 14

TABLE OF CONTENTS - Continued

Page

A. Notice Of The Availability Of Internal Procedures Has Traditionally Been Required Only In *Predeprivation* Cases, Where Process Prior To Seizure Has Been Determined To Be Necessary 15

B. *Parratt v. Taylor* And *Hudson v. Palmer* Hold That Where An Executive Agency Owes No Constitutional Duty To Provide An Internal Predeprivation Procedure, Due Process Requirements Are Satisfied If The State Makes *Available* Adequate Postdeprivation *Judicial* Remedies 17

C. The New "Notice" Requirement Created By The Court Below Assumes That Postdeprivation State And Judicial Remedies Are Somehow Inadequate If The Burden Of Learning Of Their Availability And Specifics Falls On The Claimants 21

D. The Analysis Set Forth In *Mathews* And *Memphis Light* Does Not Provide Support For This Expansion Of Procedural Rights In The Context Of Post-Deprivation Remedies, Where, As Here, Plaintiffs' Property Was Seized Pursuant To A Lawful Search Warrant And There Are Adequate State and Judicially Created Remedies 25

TABLE OF CONTENTS - Continued

Page

II. SHOULD THIS COURT DETERMINE THAT MUNICIPALITIES ARE REQUIRED TO PROVIDE SOME TYPE OF "NOTICE" IN POSTDEPRIVATION CASES, THE DECISION BELOW SHOULD NONETHELESS BE REVERSED AS THE INFORMATION LEFT BY THE POLICE IN THIS CASE WAS ADEQUATE 28

III. THE NINTH CIRCUIT'S CREATION OF THIS "NOTICE" ELEMENT TO ASSESS THE ADEQUACY OF *POST DEPRIVATION* JUDICIAL AND STATUTORY REMEDIES NOT ONLY INTRUDES INTO STATES' AUTHORITY IN THE AREA OF LAW ENFORCEMENT, BUT IT ALSO PROMISES TO INTRUDE INTO OTHER AREAS WHICH HAVE TRADITIONALLY BEEN REGULATED BY THE STATES 30

A. The Decision Below Further Complicates Section 1983 Liability For Damages In Property Cases, Especially Where There Is No Systemic Problem With The State's Corrective Process 33

B. The Effects Of The Decision Below Are Far Reaching And Require Overly Burdensome Changes To Existing State Property Seizure Procedures Which Have Long Been Considered To Be Lawful . . 35

CONCLUSION 37

TABLE OF AUTHORITIES

Page

CASES

Albright v. Oliver,
510 U.S. 266, 114 S.Ct. 807,
127 L. Ed. 2d 114 (1994) 31, 32

Barnett v. Centoni,
31 F.3d 813 (9th Cir. 1994) 19

Daniels v. Williams,
474 U.S. 327, 106 S. Ct. 662,
88 L. Ed. 2d 662 (1986) 10

Decker v. Hillsborough County Attorney's Office,
845 F.2d 17 (1st Cir. 1988) 18

Dixon v. Love,
431 U.S. 105, 97 S. Ct. 1723,
52 L. Ed. 2d 172 (1977) 16

Easter House v. Felder,
910 F.2d 1387 (7th Cir. 1990) 11, 23

Fuentes v. Shevin,
407 U.S. 67, 92 S. Ct. 1983,
32 L. Ed. 2d 556 (1972) 20, 26

Graham v. Connor,
490 U.S. 386, 109 S. Ct. 1865,
104 L. Ed. 2d 443 (1989) 31

Hudson v. Palmer,
468 U.S. 517, 104 S. Ct. 3194,
82 L. Ed. 2d 393 (1984) . . . . . *passim*

TABLE OF AUTHORITIES - Continued

Page

Illinois v. LaFayette,
462 U.S. 646, 103 S. Ct. 2609,
77 L. Ed. 2d 65 (1983) 36

Mathews v. Eldridge,
424 U.S. 319, 96 S. Ct. 893,
47 L. Ed. 2d 18 (1976) . . . . . *passim*

Memphis Light, Gas, & Water Div. v. Craft,
436 U.S. 1, 98 S. Ct. 1554,
56 L. Ed. 2d 30 (1978) . . . . . *passim*

Minsky v. City of Los Angeles,
(1974) 11 Cal. 3d 113, 520 P.2d 726 36

Mullane v. Central Hanover Bank and Trust,
339 U.S. 306, 70 S. Ct. 652 (1950) 14

Murphy v. Collins,
26 F.3d 541 (5th Cir. 1994) 19

New Alaska Dev. Corp. v. Guetschow,
869 F.2d 1298 (9th Cir. 1989) 19

North Laramie Hand Co. v. Hoffman,
268 U.S. 276 (1925) 29

Parratt v. Taylor,
451 U.S. 527, 101 S.Ct. 1908,
68 L. Ed. 2d 420 (1981) . . . . . *passim*

Ramsey v. Board of Education of Whitley County,
844 F.2d 1268 (6th Cir. 1988) 19

TABLE OF AUTHORITIES - Continued

Page

Texaco, Inc. v. Short,
454 U.S. 516, 102 S. Ct. 781,
70 L. Ed. 2d 738 (1982) . . . . . *passim*

United States v. An Article of Device "Theramatic",
715 F.2d 1339 (9th Cir. 1983) 11, 24

United States v. Edwards,
415 U.S. 800, 94 S. Ct. 1234,
39 L. Ed. 2d 771 (1974) 36

Vicory v. Walton,
721 F.2d 1062 (6th Cir. 1983) 33

CONSTITUTIONS

U.S. Const. Amend. XIV . . . . . *passim*

STATUTES

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1331 1

42 U.S.C. § 1983 . . . . . *passim*

Cal. Gov't Code § 26640 36

Cal. Penal Code § 1535 . . . . . 2, 7, 12

Cal. Penal Code § 1536 . . . . . *passim*

Cal. Penal Code § 1540 . . . . . *passim*

TABLE OF AUTHORITIES

Page

Cal. Penal Code § 4403 36

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1331 1

42 U.S.C. § 1983 . . . . . *passim*

Cal. Gov't Code § 26640 37

Cal. Penal Code § 1535 . . . . . 2, 8, 13

Cal. Penal Code § 1536 . . . . . *passim*

Cal. Penal Code § 1540 . . . . . *passim*

Cal. Penal Code § 4403 37

OTHER AUTHORITIES

Federal Rules of Civil Procedure, Rule 56 3

OPINION

The Opinion of the United States Court of Appeals for the Ninth Circuit is reported in *Perkins v. City of West Covina*, 113 F.3d 1004 (9th Cir. 1997). A copy of the Opinion is annexed in the printed appendix to the petition for certiorari as Appendix A ("Pet.App. A".).

JURISDICTION

The opinion of the Court of Appeals was filed on May 9, 1997. A timely petition for rehearing and suggestion for rehearing en banc was denied by order filed October 22, 1997; a copy of the order is annexed in the printed appendix to the petition for certiorari as Appendix F ("Pet.App. F".) The underlying action arose under the Civil Rights Act of 1871, 42 U.S.C. § 1983 and the district court's jurisdiction was based on 28 U.S.C. § 1331. Jurisdiction of this Court was invoked under 28 U.S.C. § 1254(1). Petitioner's Petition for Writ of Certiorari was filed in the Supreme Court on January 20, 1998 (Supreme Court Case No. 97-1230). This Court's order granting certiorari was issued on May 4, 1998.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourteenth Amendment to the United States Constitution, Section 1, provides, in pertinent part: ". . . No State shall . . . deprive any person of life, liberty, or property, without due process of law;. . ."[2]

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[2] A complete copy of this constitutional provision is annexed in the printed appendix to the petition for certiorari as Appendix G.

The Civil Rights Act of 1871, 42 U.S.C. § 1983, *as amended by* Act of Oct. 19, 1996, 110 Stat.3853, provides, in pertinent part: "Every person, who under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory . . . , subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in any action at law, . . ."[3]

California Penal Code § 1535 provides: "OFFICER TO GIVE RECEIPT FOR PROPERTY TAKEN: When the officer takes property under the warrant, he must give a receipt for the property taken (specifying it in detail) to the person from whom it was taken by him, or in whose possession it was found; or, in the absence of any person, he must leave it in the place where he found the property."

California Penal Code § 1536 provides: "All property or things taken on a warrant must be retained by the officer in his custody, subject to the order of the court to which he is required to return the proceedings before him, or of any other court in which the offense in respect to which the property or things taken is triable."

California Penal Code § 1540 provides: "PROPERTY, WHEN TO BE RESTORED TO PERSON FROM WHOM IT WAS TAKEN. If it appears that the property taken is not the same as than described in the warrant, or that there is no probable cause for believing the existence of the grounds on which the warrant was issued, the magistrate must cause it to be restored to the person from whom it was taken."

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[3] A complete copy of this statutory provision is annexed in the printed appendix to the petition for certiorari as Appendix H.

Petitioner (Defendant/Appellant below) City of West Covina ("City") filed its certiorari petition on January 20, 1998 seeking review of a judgment entered on May 9, 1997 of the Ninth Circuit reversing the final judgment of the United States District of the Central District of California, pursuant to Federal Rules of Civil Procedure, Rule 56, in favor of City and against Respondents (Plaintiffs/Appellees below): Lawrence Perkins, Clara Perkins, and April Perkins, a minor, by and through Lawrence Perkins, in plaintiffs' civil rights action seeking damages for the deprivation of their procedural due process rights.

◆

STATEMENT OF THE CASE

A. Procedural History Of The Litigation In The District Court And Summary Of The Ninth Circuit's Opinion

Plaintiffs and Respondents Lawrence, Clara and April Perkins (hereinafter "plaintiffs" or "Perkins") sued the City of West Covina (hereinafter "City") and various detectives and officers of the City, initially alleging various Fourth Amendment violations arising out of an execution of a search warrant in connection with a murder investigation involving a former boarder. (J.A. 7-11.)[4] Several items, including a "starter pistol" and $2,469.00 in cash, were seized from plaintiffs' residence during the execution of the warrant on May 21, 1993. (J.A. 84.)

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[4] Specifically, plaintiffs' complaint alleged that officers of the West Covina Police Department searched plaintiffs' home without probable cause, caused damage to plaintiffs' property during the search, seized money from plaintiffs home and conducted the search in a manner that far exceeded the scope authorized under the warrant. (J.A. 7-9.)

On May 10, 1994, the district court granted summary adjudication in favor of the individual officers with respect to several of plaintiffs' Fourth Amendment claims and granted summary adjudication in favor of the City insofar as the claims against the City were based upon the officers' search of plaintiffs' residence. (Pet.App. B 4.) However, the district court postponed ruling on an *unalleged* procedural due process claim, i.e., that the *postdeprivation* judicial remedy for return of the seized property was inadequate, and ordered further briefing from the parties. (Pet.App. B 6-7.) Plaintiffs never filed an amended complaint adding this unalleged claim, and the district court did not rule on this claim prior to entry of the final judgment. (Pet.App. D 2.)

Judgment was entered in favor of all defendants on August 4, 1994, and plaintiffs appealed on August 31, 1994. (J.A. 65; Pet.App. C.) However, on April 30, 1996, the Ninth Circuit remanded the case to the district court to clarify and resolve the procedural due process issue, i.e., plaintiffs' claim that the City violated due process by failing to provide adequate postdeprivation procedure for the recovery of seized property. (Pet.App. D 2.)

The District Court's Findings and Conclusions on Limited Remand. On the limited remand, the district court issued an order stating that the postdeprivation due process claim was not resolved during the prior proceedings and invited the parties to file a motion for summary judgment to attempt to resolve the claim. (Pet.App. E 2.) Accordingly, the City filed a motion for summary judgment and the plaintiffs filed a cross-motion for summary judgment. (Pet.App. E 2.) After a hearing and having considered the arguments made by the parties, the district court granted summary judgment in favor of the City, holding that plaintiffs waived any claim concerning the adequacy of the postdeprivation judicial remedy provided

by California Penal Code section 1536. The district court reasoned that the waiver rule applied because:

> '[t]he evidence shows at most that the plaintiff [Lawrence Perkins] made one trip to the Municipal Court, was advised that there was no file in his name and ceased any efforts to obtain an order returning his property. He filed nothing, he made no inquiry about the procedures . . . .'

(Pet.App. E 7.)

The district court also refused to excuse plaintiffs' failure to avail themselves of this judicial/statutory remedy on the grounds that the City failed to give "notice" of the remedy, finding that plaintiff Lawrence Perkins "was told that he had to get a court order to get his property back, he was told what court and what judge to go to, and he was given the date of the warrant and of the search." (Pet.App. E 7.) Therefore, "[t]he City's failure to give Perkins formal notice of the procedure did not render that procedure 'inadequate to the point that it [wa]s meaningless or nonexistent.'" (Id.)

The Ninth Circuit's Opinion. On appeal, a two-judge majority of the Ninth Circuit Court of Appeals reversed summary judgment in favor of the City, and directed the district court to enter summary judgment in favor of the plaintiffs. The Court of Appeals determined that under well established legal precedent, there was "no requirement of a prior hearing before the seizure of possessions under the search warrant." (Pet.App. A 14-15.) The court also found that California Penal Code sections 1536, 1540, and state mandamus procedures, provided "adequate" postdeprivation judicial remedies to recover the property. (Pet.App. A 17.) The Court of Appeals acknowledged that plaintiffs were told by a City police officer that they had to obtain a court order for the return of the property, and

acknowledged that the officers executing the warrant left a note at the search site which stated:

> To Whom it May Concern:
>
> 1. These premises have been searched by peace officers of the West Covina Police Department pursuant to a search warrant issued on 5-20-93, by the Honorable Dan Oki, judge of the Municipal Court, Citrus Judicial District.
> 2. The search was conducted on 5-21-93. A list of the property seized pursuant to the search warrant is attached.
> 3. If you wish further information, you may contact Detective Ferrari or Det. Melnyk at [telephone number].

(J.A. 76-77; Pet.App. A 4-5.) The form also listed "Lt. Schimanski"'s name and his telephone number. (J.A. 77; Pet.App. A 5.)

The Court of Appeals also acknowledged that "the search warrant was listed in a public document with the court clerk by the address where the search occurred, along with the number of the search warrant." (Pet.App. A 6.) Nonetheless, the court held that the City violated plaintiffs' procedural due process rights by failing to provide adequate postdeprivation "notice" of this judicial remedy which, according to the court, was required under *Memphis Light, Gas, & Water Div. v. Craft*, 436 U.S. 1, 98 S. Ct. 1554, 56 L. Ed. 2d 30 (1978), and the balancing test set forth in *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976). (Pet.App. A 17-20.) Specifically, the court below concluded that the City violated plaintiffs' rights by failing to include in the note left at the search site "the availability of a judicial remedy should [they] wish to claim [their] property," or to "provide some guidance for invoking that remedy." (Pet.App. A 18.) The court held that, at minimum, the "note" left on the premises must not

only include the information which was provided in this particular case, but also the following:

> the notice must inform the recipient of the procedure for contesting the seizure or retention of the property taken, along with any additional information required for initiating that procedure in the appropriate court. In circumstances such as those presented by this record, the notice must include the search warrant number or, if it is not available or the record is sealed, the means of identifying the court file. It also must explain the need for a written motion or request to the court stating why the property should be returned.

(Pet.App. A 22.)

At the same time, however, the Court of Appeals correctly acknowledged that the trial court, not police officers, has exclusive authority over the procedures for obtaining the release of seized property:

> [o]fficers seizing property do so on behalf of the court for use in a judicial proceeding, and they must respond to court orders to release the property. (Citation). The officers have no right in the property or in its possession, *and have no authority over it except as the court may order*. (Citation [emphasis added].)

(Pet.App. A 16.)

B. Summary Of The Evidence

When the warrant authorizing the search of plaintiffs' residence was issued by the municipal court, it was sealed because it was connected to an ongoing murder investigation. (J.A. 45.) Pursuant to California Penal Code section 1535, the City police left at the plaintiffs'

home an inventory sheet which listed 17 items seized pursuant to the warrant, including a starter pistol and cash in the sum of $2,469. (J.A. 84.) Attached to the inventory sheet, the City police also left a form called "Search Warrant: Notice of Service." (J.A. 76-77.) This form stated: "If you wish further information, you may contact Det. Ferrari" or another detective, and gave their telephone numbers. It also identified the searching agency (West Covina Police), gave the date that the warrant was issued (May 20, 1993) as well as the date of the search (May 21, 1993), and identified the issuing court and judge (Dan Oki of the Citrus Municipal Court). (J.A. 76-77.)

Following the search of plaintiffs' residence, Detective Ferrari filed the search warrant and the return of search warrant with the criminal clerk of the Citrus Municipal Court. (J.A. 45.) Even though the search warrant was sealed, it was listed in a public document with the criminal court clerk by the address where the search occurred, along with the number of the search warrant. (J.A. 45-46; Pet.App. A 6.)

Shortly after the execution of the search warrant, Mr. Perkins contacted the police department regarding the property seized from his residence. Mr. Perkins was advised that a court order was required for the release of his property from the police department. (J.A. 122.) He was further advised to go see Judge Oki who had signed the original search warrant. (J.A. 40, 124.) Mr. Perkins contends that about one month after the execution of the search, he attempted to get a court order for the release of his property by going to the Citrus Municipal Court. (J.A. 122-123.) He claims that he was advised by court personnel that Judge Oki was on vacation and that he would be gone a week or two but that any judge could release the property. (J.A. 40, 124.) Mr. Perkins attempted to obtain an order for the release of the property by providing his name only. (J.A. 124.) When he was purportedly advised that there was nothing in the court

under his name, he ceased any efforts to obtain an order for the return of his property. (J.A. 123-124.) He did not submit any kind of written request, fill out any form, go back to the court on any other occasion, or make any other inquires in any manner to the court. (J.A. 124; Pet.App. E 7.) Rather, he merely contacted the police department to advise that he had been unable to obtain a court order for the release of his property, at which point the suggestion was made by Detective Ferrari that Mr. Perkins may want to retain an attorney to assist him in getting a court order. (J.A. 40.)

Even after plaintiffs retained counsel prior to or in December of 1993 in connection with their instant lawsuit, plaintiffs and their counsel did nothing to obtain a court order for the release of the seized property. Plaintiffs' counsel was aware of the search warrant number as early as January 26, 1994 and at the latest, March 15, 1994. (J.A. 70.) However, even having the search warrant number, plaintiffs' counsel did nothing to obtain an order for the release of the property seized. (J.A. 70.) In fact, it was only in response to the City's motion for summary judgment that the office of plaintiffs' counsel even contacted the Citrus Municipal Court on May 2, 1994 and inquired about obtaining the number for the subject warrant. (J.A. 77.)

When it became apparent to the City's counsel that plaintiffs were going to attempt to rely on their own lack of effort to support their contention that the West Covina Police Department was wrongfully maintaining custody of their seized property, the City's counsel prepared and filed on May 17, 1994, a request and proposed order releasing the seized property to the plaintiffs or their counsel which was signed by the judge on June 17, 1994 (J.A. 69.) On June 24, 1994, upon receipt of the June 17, 1994 court order, the police department released all items referenced in the order, including the cash, to plaintiffs. (J.A. 71, 85.) The starter pistol, however, was not released since

the police department determined from a crime report that the pistol was reported stolen from a local high school. (J.A. 71.)

SUMMARY OF THE ARGUMENT

1. By imposing a constitutional duty on police officers to advise persons whose property has been seized pursuant to a search warrant of the existence and specifics of the state and judicially created postdeprivation remedies, the decision below adds a due process requirement that is neither supported by case law nor the Due Process Clause. This new procedural due process right to legal advice under the guise of an expanded "notice" requirement cannot be reconciled with the holdings and rationale of *Parratt v. Taylor*, 451 U.S. 527, 544, 101 S. Ct. 1908, 1917, 68 L. Ed. 2d 420 (1981), overruled in part on other grounds, *Daniels v. Williams*, 474 U.S. 327, 106 S. Ct. 662, 88 L. Ed. 2d 662 (1986) and *Hudson v. Palmer*, 468 U.S. 517, 104 S. Ct. 3194, 82 L. Ed. 2d 393 (1984), which hold that if a state executive agency[5] is not required to provide a hearing prior to the seizure of a property interest, procedural due process is satisfied as long as adequate postdeprivation *judicial* remedies *are made available* to the claimant. The rationale behind these decisions is that the predeprivation notice that has been traditionally required under the Due Process Clause is simply impracticable or otherwise not necessary – either because the state cannot know when such deprivations will occur (such as in situations where the deprivation of property is occasioned by random or unauthorized acts) or because of the necessity of quick action by the state (such as in situations where the

[5] The term "executive agency" refers to any public agency charged with the responsibility of implementing the laws or regulations of the State of California.

deprivation of property occurs pursuant to a search warrant). Accordingly, this Court has held that in situations where no predeprivation hearing is required, due process is satisfied where there is an adequate postdeprivation remedy.

While the court below correctly found that plaintiffs in this case had an adequate postdeprivation remedy under state law, it erroneously held that due process was violated by having failed to advise plaintiffs of the availability of this state remedy and provide guidance for invoking the remedy. This holding assumes that a state or judicially created remedy is not adequate if the burden of the knowledge of its procedures falls on the claimants. This assumption contravenes *Texaco, Inc. v. Short*, 454 U.S. 516, 102 S. Ct. 781, 70 L. Ed. 2d 738 (1982), where this Court held that where a statute sets forth the procedures for protecting property interests, claimants affected by the statute are charged with knowledge of its procedures. Moreover, *Parratt* and *Hudson* do not suggest that state judicial remedies will be rendered meaningless or inadequate if an executive agency--which has no authority over the remedies--fails to provide legal advice concerning the availability of the remedies and guidance for invoking them. Rather, the holdings of *Parratt* and *Hudson*, as well as various circuit decisions, have made clear that a state law judicial remedy is not "inadequate" simply because a claimant has the burden of requesting the judicial relief sought, or because the judicial road to recovery may be lengthy or burdensome. (*See also*, *United States v. An Article of Device "Theramatic"*, 715 F.2d 1339, 1342 (9th Cir. 1983) and *Easter House v. Felder*, 910 F.2d 1387, 1405-06 (7th Cir. 1990)).

2. *Memphis Light, Gas & Water Division v. Craft*, 436 U.S. 1, 98 S. Ct. 1554, 56 L. Ed. 2d 30 (1978), does not provide support for the Court of Appeals' creation of this new procedural due process right. In *Memphis Light*, this

Court held that a municipal agency had a constitutional duty to provide a procedure for disputing utility bills prior to discontinuance of gas and electricity because the utilities were essential to the health and safety of citizens, and even a brief cessation could result in serious health and safety concerns. *Id.* 436 U.S. at 20, 98 S. Ct. at 1566. The constitutional duty to provide adequate "notice" of these *internal administrative* procedures was part and parcel of the agency's Constitutional duty to provide a meaningful opportunity to be heard *prior to the loss of life-essential utility services.*

No one is asserting that a city police department is required to provide a hearing prior to the seizure of property under a search warrant. (Pet.App. A 14.) Furthermore, in this case, the postdeprivation remedies are provided under state law, not by any city ordinance or internal procedure. In other words, the entity (municipality) here, unlike in *Memphis Light*, did not create and has no control over the *postdeprivation* judicial remedies. In that regard, the court below erroneously assumed that the judicial remedies set forth in Penal Code sections 1536 and 1540, and the inventory receipt which officers are required to leave at the scene of a seizure under Penal Code section 1535, constitute "City" policies which subject the City to *Monell* liability. (Pet.App. A 13.) While the "practice" of leaving an inventory receipt of property is required by section 1535, it does not follow that the inventory receipt constitutes some sort of "written notice" which gives rise to a constitutional duty to provide legal advice concerning available judicial remedies.

By imposing section 1983 liability under the guise of an expanded "notice" requirement, the Court of Appeals has imposed upon police officers and other city officials, who are not attorneys, the obligation of providing legal advice on matters outside their knowledge or control. The court effectively created an entirely new right to legal

advice concerning *postdeprivation* judicial remedies that finds no support in *Memphis Light*.

3. Should this Court find that city police officers are required to provide some type of "notice" in *postdeprivation* cases, the decision below should nonetheless be reversed as the information left by the City's police officers in this case sufficiently apprised plaintiffs of information essential to invoke state remedies. The form left by the police officers at plaintiffs' residence which identified the searching agency (West Covina Police), gave the date that the warrant was issued (May 20, 1993) as well as the date of the search (May 21, 1993), and identified the issuing judge and court (Dan Oki of the Citrus Municipal Court) (J.A. 76-77) cannot be said to have been meaningless under the traditional principles of Due Process notice.

While the decision below requires the police department to include the "search warrant number or, if it is not available or the record is sealed, the means of identifying the court file," plaintiffs produced no evidence that the lack of a search warrant number otherwise precluded them from obtaining a court order. To the contrary, when Mr. Perkins was advised by court personnel that there was no file under his name, he ended his inquiry rather than attempt to invoke the procedure by using the information that was contained in the form left by the police. Moreover, the additional information required by the court below (i.e., that the notice "must explain the need for a written motion or request to the court stating why the property should be returned") imposes an undue burden on police officers and city officials as they have no authority or control over how the court administers judicial remedies, just as they have no authority or control over how court personnel identify their various cases and files.

Furthermore, this newly fashioned right cannot be limited in any principled manner—the right exists any time

state law provides a judicial remedy for official deprivation of private interests. Accordingly, as more fully set forth below, the City's failure to provide plaintiffs formal notice of the procedure to obtain a court order for release of the property did not render that procedure inadequate to the point that it was meaningless or nonexistent.

ARGUMENT

I. THE COURT OF APPEALS ERRONEOUSLY CREATED A NEW *NOTICE* REQUIREMENT IN *POSTDEPRIVATION* PROCEDURAL DUE PROCESS CASES IN A MANNER THAT CONFLICTS WITH THIS COURT'S DECISIONS AND DECISIONS IN OTHER CIRCUIT COURTS

This Court's decisions, as well as the decisions in other circuit courts, have recognized two categories of procedural due process claims, and have articulated frameworks for determining whether the particular procedures at issue provide due process. In circumstances requiring a *predeprivation* hearing, this Court has held that notice of such a hearing and an opportunity to be heard prior to the deprivation are necessary because:

> The fundamental requisite of due process of law is the opportunity to be heard. (Citations). This right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest.

Mullane v. Central Hanover Bank and Trust, 339 U.S. 306, 70 S. Ct. 652, 657 (1950). Accordingly, this Court has developed and applied the *Mullane* standard of "notice reasonably calculated, under all the circumstances, to

apprise interested parties of the *pendency of the action*," in the context of *predeprivation* procedures.

However, the reasons for requiring such notice simply do not apply to the second category of cases involving *postdeprivation* judicial or statutory remedies designed to correct a deprivation that has already occurred. This is because there is no "pending action" of which the interested party must be informed. Rather, the remedies pre-exist and a hearing takes place only if the interested party decides to invoke the process. In such cases, there is no need to provide notice since it is the claimant who has generated the hearing.

While the court below correctly recognized that seizure of property under a search warrant may occur without a prior hearing, it erred in creating a new procedural due process right to legal advice under the guise of an expanded "notice" requirement in postdeprivation cases

A. Notice Of The Availability Of Internal Procedures Has Traditionally Been Required Only In *Predeprivation* Cases, Where Process Prior To Seizure Has Been Determined To Be Necessary

This Court has employed the balancing test set forth in *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976), to determine whether Due Process requires some form of notice and hearing prior to the deprivation of a property or liberty interest. The *Mathews* balancing test requires consideration of the following three factors:

> First, the private interest affected by the official action; second, the risk of erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute

> procedural safeguards; and finally, the Government's interest, including the function involved, and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 336, 965 S. Ct. at 903.

In *Mathews*, this Court weighed a disability claimant's interest in continued disability benefits, the fairness and reliability of existing pre-termination procedures, the probable value of additional procedural safeguards, and the burden of such additional safeguards, and concluded that due process does not require an evidentiary hearing prior to the discontinuance of disability benefits. *See also*, *Dixon v. Love*, 431 U.S. 105, 112-115, 97 S. Ct. 1723, 1727-29, 52 L. Ed. 2d 172 (1977) (no evidentiary hearing required under *Mathews* factors prior to revocation of license for outstanding traffic tickets because respondent has opportunity for full judicial hearing in the underlying traffic convictions); *see also*, *Memphis Light, Gas, & Water Div. v. Craft, supra*, 436 U.S. at 16-19, 98 S. Ct. at 1564-65, (the *Mathews* factors require a municipal utility company to provide notice of its internal procedures for protesting the proposed termination of utility services *before* termination—notice of dispute resolution procedures prior to terminating utility service held to be inadequate).

Accordingly, in *predeprivation* cases, a public entity (usually, an administrative agency) has authorized certain procedures to be followed before a deprivation can occur and the due process analysis is whether the "notice" given and the procedures made available provide a meaningful opportunity to be heard prior to the deprivation of a property or liberty interest. However, the requirement of notice reasonably calculated to apprise interested parties of the pendency of the action, which is the central inquiry in analyzing predeprivation cases, is inapplicable where, as

here, plaintiffs' property was seized pursuant to a lawful search warrant, without the need for a predeprivation hearing.

B. *Parratt v. Taylor* And *Hudson v. Palmer* Hold That Where An Executive Agency Owes No Constitutional Duty To Provide An Internal Predeprivation Procedure, Due Process Requirements Are Satisfied If The State Makes *Available* Adequate Postdeprivation *Judicial* Remedies

This Court has held that if a state executive agency[6] is not required to provide a hearing prior to the seizure of a property interest, procedural due process is satisfied if adequate postdeprivation *judicial* remedies *are made available* to the claimant. *Parratt v. Taylor*, *supra*, 451 U.S. at 544, 101 S. Ct. at 1917; *Hudson v. Palmer*, *supra*, 468 U.S. 517, 104 S. Ct. 3194. The rationale behind these decisions was the recognition that:

> [E]ither the necessity of quick action by the State or the impracticality of providing any meaningful predeprivation process, when coupled with the availability of some meaningful means by which to assess the propriety of the State's action at some time after the initial taking . . . satisf[ies] the requirements of procedural due process.

Id. at 541, 101 S. Ct. at 1916; *Id.* at 533, S. Ct. at 3203.

In *Parratt v. Taylor*, a state prisoner sued prison officials under 42 U.S.C. § 1983, alleging that their

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[6] The term "executive agency" refers to any public agency charged with the responsibility of implementing the laws or regulations of the State of California.

negligent loss of a hobby kit he ordered from a mail-order catalog deprived him of property without due process of law. After balancing the relevant interests, this Court determined that the normal "predeprivation notice and opportunity to be heard" was "pretermitted" or "impracticable" under the circumstances. Therefore, this Court held that "the availability of some meaningful means by which to assess the propriety of the State's action at some time after the initial taking . . . satisf[ies] the requirements of procedural due process." *Id.* at 539, 101 S. Ct. at 1915. Since the state tort claims act provided an adequate post-deprivation remedy, notwithstanding the fact that the state remedies may not provide the plaintiff with all the relief which may have been available if he could have proceeded under § 1983, procedural due process was found to be satisfied. (*Id.* at 543, 101 S. Ct. at 1915).

Similarly, in *Hudson v. Palmer*, a prisoner alleged that during the search of his cell, a prison guard deliberately and maliciously destroyed some of the prisoner's possessions. This Court determined that correctional officers were not in a position to provide a predeprivation procedure, and that under Virginia law, the prisoner's right to sue the correctional officer for conversion or detinue provided all the process that was due. *Id.* at 534-35, 104 S. Ct. at 3204. This Court rejected plaintiff's argument that state law remedies should be deemed inadequate because they were "far from certain and complete," observing the fact that an injured party "might not be able to recover under [state law] remedies the full amount which he might receive in a section 1983 action is not . . . determinative of the adequacy of the state remedies. (Citation)."*Id.* at 535, 104 S. Ct. at 3204-05.

Following the rationale of *Parratt* and *Hudson*, circuit courts have also held that procedural due process is satisfied where the state provides an adequate postdeprivation remedy. *See*, *Decker v. Hillsborough*

County Attorney's Office, 845 F.2d 17, 22 (1st Cir. 1988) (state's failure to return a criminal defendant's property to him immediately upon his acquittal did not constitute deprivation of property without due process because the state statute provided judicial procedures through which to assert his property right); *Murphy v. Collins*, 26 F.3d 541, 543 (5th Cir. 1994) (no procedural due process violation where prisoner's property confiscated in violation of the prison's procedures because prisoner could pursue a tort action for conversion); *Ramsey v. Board of Education of Whitley County*, 844 F.2d 1268, 1272 (6th Cir. 1988) (no procedural due process violation where school district unilaterally reduced teacher's compensation for sick leave days because teacher could pursue breach of contract action); *Barnett v. Centoni*, 31 F.3d 813, 816 (9th Cir. 1994) (no procedural due process violation where a state inmate's prison status was downgraded in a disciplinary action because California law provided an adequate post-deprivation remedy for any property deprivation); *New Alaska Dev. Corp. v. Guetschow*, 869 F.2d 1298, 1305 (9th Cir. 1989) (the *availability* of "post-deprivation state law remedies provides all the process due" for a court-appointed receiver's alleged misappropriation of funds in a divorce proceeding); *Economic Dev. Corp. v. Stierheim*, 782 F.2d 952, 955-56 (11th Cir. 1986) (state law tort remedies provide all the process that is due even if relief under section 1983 would be greater).

As in the foregoing cases, including *Parratt* and *Hudson*, the City in this case was not required to hold a predeprivation hearing. This Court articulated the following reasons why seizure of property under a search warrant may occur without a prior hearing:

> First, a search is generally issued to serve a highly important governmental need—*e.g.*, the apprehension and conviction of criminals—rather than the mere private advantage of a private party

> in an economic transaction. Second, a search warrant is generally issued in situations demanding prompt action. The danger is all too obvious that a criminal will destroy or hide evidence of fruits of his crime if given any prior notice. Third, the Fourth Amendment guarantees that the State will not issue search warrants merely upon the conclusory application of a private party. It guarantees that the State will not abdicate control over the issuance of warrants and that no warrant will be issued without a prior showing of probable cause.

Fuentes v. Shevin, 407 U.S. 67, 93-93 n.30, 92 S. Ct. 1983, 2001, 32 L. Ed. 2d 556 (1972).

While the specific fact making a meaningful predeprivation hearing "impracticable" in *Parratt* and *Hudson* was the deprivation of property occasioned by a random and unauthorized act by a state employee, thereby making it impossible for the state to predict when the loss would occur, the necessity of quick action by the state that has long been recognized in connection with search warrants rendered a meaningful predeprivation hearing unnecessary in this instant case.

Accordingly, all that was required to satisfy procedural due process in this case was the availability of an adequate postdeprivation procedure for the return of the seized property. As the court below recognized, plaintiffs had available to them, a postdeprivation procedure for the return of the seized property in the form of a "nonstatutory" motion under California Penal Code section 1536 and a motion under Penal Code section 1540. (Pet.App. A 17.) Because these various remedies were found to "satisfy the requirements of due process" (Pet.App. A 17), the City did not violate plaintiffs' procedural due process rights and the Court of Appeals' decision holding otherwise should be reversed.

C. The New "Notice" Requirement Created By The Court Below Assumes That Postdeprivation State And Judicial Remedies Are Somehow Inadequate If The Burden Of Learning Of Their Availability And Specifics Falls On The Claimants

While the Court of Appeals correctly recognized that plaintiffs had available to them adequate postdeprivation statutory and judicial remedies for the return of the seized property, it erroneously placed the burden of providing "notice" of the existence and specifics of these state and judicially created postdeprivation remedies on the City's police officers. The Court of Appeals' creation of this new procedural due process right to "notice" in postdeprivation cases is not only contrary to legal precedent, but also to common sense and common understanding, for a variety of reasons.

First, as the court below acknowledged, under California law, the authority over these judicial remedies is vested exclusively in the court system. (Pet.App. A 16.) As such, the judicial remedies in this instant case are indistinguishable from the category of judicial or statutory remedies available to civil rights plaintiffs in cases such as *Parratt v. Taylor*, *supra*, *Hudson v. Palmer*, *supra*, and numerous decisions in the circuit courts of appeal. None of these cases even remotely suggest that due process requires a municipality, which has no authority over the property in question or the procedures necessary to invoke these remedies, to provide advance legal advice or information concerning how to pursue the remedies after a deprivation has occurred but before an aggrieved party invokes the judicial remedy.

Secondly, this new procedural due process right to legal advice under the guise of an expanded "notice" requirement ignores the general rule that a person is charged with knowledge of statutory provisions which

affect their substantive rights. *Texaco, Inc. v. Short*, *supra*, 454 U.S. 516, 102 S. Ct. 781. In *Texaco*, a state statute provided that a severed mineral interest automatically reverts to the surface owner of the property if not used by the mineral owner for 20 years, unless the mineral owner files a statement of claim in the local county recorder's office. The statute did not require notice, but "set forth a procedure. . . by which the surface owner who succeeded to the ownership . . . may give notice that the mineral interest has lapsed." Appellant mineral owners failed to avail themselves of the claim procedure and their property reverted to the surface owners. Appellants claimed that the statute violated their due process rights because "the State of Indiana did not adequately notify them of the legal requirements of the new statute." *Id.* at 352, 102 S. Ct. at 793. This Court rejected the argument outright:

> The first question raised is simply how a legislature must go about advising its citizens of actions that must be taken to avoid a valid rule of law . . . The answer to this question is no different from that posed for any legislative enactment affecting substantial rights . . . . It is well established that persons owning property within a State are charged with knowledge of relevant statutory provisions affecting the control or disposition of such property.

(*Id.* at 533, 102 S. Ct. at 793-794.)

As in *Texaco, Inc. v. Short*, plaintiffs in this case and others whose rights are affected by the various California Penal Code provisions relating to the seizure and return of their property are "charged with the knowledge" of the legal requirements contained in these statutes. By imposing a constitutional duty on police officers to advise persons whose property has been seized pursuant to a search warrant of the existence and specifics of the state and

judicially created postdeprivation remedies, the decision below contravenes the holding in *Texaco*.

Moreover, the opinion below suggests that a state judicial remedy is not "adequate" if, in the absence of legal assistance, the remedy is burdensome and lengthy. However, in *postdeprivation* cases, the available judicial or statutory remedies are not inadequate simply because recovery might be difficult, time-consuming, speculative, or uncertain. *Parratt v. Taylor*, *supra*, 451 U.S. at 543-44, 101 S. Ct. at 1917 (since the state tort remedy was available at the time of the plaintiff's loss and he failed to use it, he failed to state a procedural due process claim); *Hudson v. Palmer*, *supra*, 468 U.S. at 535, 104 S. Ct. at 3204-05 (this Court rejected plaintiff's argument that state law remedies should be deemed inadequate because they were "far from certain and complete.").

Judicial remedies simply have not been deemed inadequate simply because a claimant has not been aware of the available remedy, or has had difficulty in trying to invoke the remedy. To the contrary, in *Easter House v. Felder*, *supra*, 910 F.2d at 1405-06, plaintiff, a daycare provider, sued a state licensing agency and its employees for allegedly depriving it of a property interest because of the agency's delay in renewing the provider's daycare license. The court held that various post-deprivation tort remedies provided all the process that was "due" even though "the state road to recovery" might be a "lengthy and speculative process":

> We note that almost all litigation, whether conducted in a state or federal forum, may be characterized as a lengthy and speculative process. Litigants often decry the speed with which court's administer justice and likewise lament that a particular forum may yield a more favorable result depending upon the nature of the claim and the

> particular position they support. However, we should not reject the application of *Parratt* unless the remedy which an injured party may pursue in state court can be readily characterized as inadequate to the point that it is meaningless or nonexistent and, thus, in no way can be said to provide the due process relief guaranteed by the Fourteenth Amendment.

Id. at 1406; *see also, United States v. An Article of Device "Theramatic"*, *supra*, 715 F.2d at 1342-43 (rejecting plaintiff's claim that a post-seizure judicial hearing was inadequate because it put the "burden on defendant to request a hearing").

Clearly, none of these decisions even remotely suggests that an executive agency's failure to "notify" a claimant "of the availability of a judicial remedy" and "provide some guidance for invoking that remedy" will render the postdeprivation judicial remedy inadequate. Indeed, the Court of Appeals' opinion ignores the fact that a section 1983 "postdeprivation" remedy might well be more cumbersome than the judicial procedures provided by California law.

Simply put, the decision below is based on the same argument repeatedly *rejected* by this Court and other circuit courts, namely, that a post-deprivation remedy is inadequate if the remedy is burdensome, lengthy, uncertain, or speculative.

D. The Analysis Set Forth In *Mathews* And *Memphis Light* Does Not Provide Support For This Expansion Of Procedural Rights In The Context Of Post-Deprivation Remedies, Where, As Here, Plaintiffs' Property Was Seized Pursuant To A Lawful Search Warrant And There Are Adequate State and Judicially Created Remedies

The analysis set forth in *Mathews v. Eldridge*, *supra*, and applied in *Memphis Light*, *supra*, provides no support for the Ninth Circuit's expansion of procedural rights in the context of post-deprivation remedies. In *Memphis Light*, this Court held that a municipal utility agency subject to control by the municipality had a constitutional duty to provide "notice" of available internal administrative procedures for disputing utility bills *prior* to discontinuance of gas and electricity. 436 U.S. at 4, 14-15, 98 S. Ct. at 1557, 1563. Three critical facts, absent in the present case, were essential to this Court's determination. First, because the utilities were deemed to be "essential" to the health and safety of citizens, and even a brief cessation could result in serious health and safety concerns, the *Mathews v. Eldridge* factors required a municipal utility company to provide a predeprivation hearing. 436 U.S. at 4, 19-20, 98 S. Ct. at 1537, 1559, 1565.

Second, the municipal utility company had authority over the "res" in question, namely, the services deemed to be "essential" to its customers.

Third, the municipal utility company had developed dispute resolution procedures as required by state law. *Id.* at 15, n. 16, 98 S. Ct. at 1563. Pursuant to that authority, the utility developed detailed *internal* procedures for the resolution of disputed bills prior to a proposed termination. *Id.* at 5, n. 4, 13, 98 S. Ct. at 1559, 1562 ("'The billing of customers, the determination as to when a final notice is

sent, and the termination of service [are] governed by policies, rules and regulations adopted and approved by the Board of Commissioners of MLG&W.' (Citation)."). In other words, the municipal utility's duty to provide such procedures and its *authority* over the distribution of the property at issue gave rise to a constitutional duty to provide adequate "notice" of its internal administrative procedure prior to a termination of *life-essential* utility services.

In the present case, the City's police officers were not required to provide a predeprivation hearing for seizures of property pursuant to a search warrant. In essence, the factors set forth in *Mathews v. Eldridge, supra*, have already been weighed in determining whether some form of predeprivation notice and hearing is required. Because the private property interest affected by the official action is negligible compared to the highly important governmental need (*e.g.*, the apprehension and conviction of criminals), the risk of erroneous deprivation of such interest is relatively low given that the Fourth Amendment guarantee that the state will not issue warrants merely upon the conclusory application of a private party, and the requirement of an opportunity for an adversary hearing before a search warrant is issued will defeat its very purpose as a search warrant is generally issued in situations demanding prompt action, this Court has never implied that the Due Process Clause is violated where seizure of property under a search warrant occurs without a predeprivation hearing. *Fuentes v. Shevin, supra*, 407 U.S. at 93, n. 30, 92 S. Ct. at 2001.

Moreover, the procedures at issue are not procedures created and periodically modified by the City. They are creatures of state law. It makes sense to require the municipal utility company in *Memphis Light* to give notice of its own procedures, for who else could reliably do so. But when the procedures are provided by state law, all

plaintiffs have to do is look to the statutes. *See, Texaco, Inc. v. Short, supra*, 454 U.S. at 533, 102 S. Ct. at 793-794. ("It is well established that persons owning property within a State are charged with knowledge of relevant statutory provisions affecting the control or disposition of such property.")

Furthermore, unlike *Memphis Light*, a California municipality has no authority over the disposition of property seized pursuant to a search warrant. As the Court of Appeals acknowledged, California *courts* have exclusive authority over such property, and the city police officers cannot release such property except by court order. (Pet.App. A 16.) While a municipality may have information that might be helpful to pursue these remedies, it does not follow that it has a constitutional duty to provide that information after a deprivation has already occurred and before an aggrieved party seeks to invoke the remedy. *Cf. Hudson v. Palmer*, 468 U.S. at 534 (rejecting argument that "because an agent of the state who intends to deprive a person of his property can provide predeprivation process, then as a matter of due process he must do so.")

Nonetheless, the Court of Appeals, on pain of section 1983 liability, has imposed an on-going *constitutional* duty on city police officers to research, monitor, and identify potential weaknesses in court procedures relating to the return of seized property, and to provide information concerning these court procedures after a deprivation has occurred but before the remedy is invoked by an aggrieved party. This result not only ignores this Court's decisions relating to post-deprivation remedies--which place the burden on an aggrieved party to avail himself of "adequate" post-deprivation judicial or statutory remedies--but also finds no support in *Memphis Light, supra*, or *Mathews, supra*.

Because the Court of Appeals ignored these critical distinctions altogether, it is unsurprising that it also erroneously assumed that a municipality--rather than the courts or plaintiffs' counsel--was required to provide information concerning how to invoke and pursue this otherwise adequate judicial remedy.

II. SHOULD THIS COURT DETERMINE THAT MUNICIPALITIES ARE REQUIRED TO PROVIDE SOME TYPE OF "NOTICE" IN POSTDEPRIVATION CASES, THE DECISION BELOW SHOULD NONETHELESS BE REVERSED AS THE INFORMATION LEFT BY THE POLICE IN THIS CASE WAS ADEQUATE

Should this Court find that police officers are required to provide some type of "notice" in *postdeprivations* cases where property is seized pursuant to a search warrant, the decision below should nonetheless be reversed as the information left by the City's police officers sufficiently apprised plaintiffs of the information necessary to invoke state judicial remedies. The form left by the police officers at plaintiffs' residence, which identified the searching agency (West Covina Police), gave the date that the warrant was issued (May 20, 1993) as well as the date of the search (May 21, 1993), and identified the issuing judge and court (Dan Oki of the Citrus Municipal Court) (J.A. 76-77), cannot be said to have been meaningless under the traditional principles of due process notice.

While the decision below requires the police department to include the "search warrant number or, if it is not available or the record is sealed, the means of identifying the court file" (Pet.App. A 22), plaintiffs failed to produce any reliable evidence concerning what the proper court procedures were for invoking and pursuing this remedy, or what information they lacked which was necessary to pursue the remedy. (Pet.App. E 6 ["there is no evidence either way about whether one must have the warrant

number in order to obtain a court order releasing seized property"]).[7] Rather, the uncontroverted evidence established that the search warrant was listed in a public document with the court clerk by the address where the search occurred (Pet.App. A 6.). However, when Mr. Perkins was advised by court personnel that there was no file under his name, he ended his inquiry rather than attempt to invoke the procedure by using the information that was contained in the form left by the police. (Pet.App. E 7.)

The Court of Appeals' criticism of the police department's failure to mention the availability of any procedure for protesting the seizure of his property and the existence of a formal judicial procedure for obtaining return are based on two erroneous assumptions. First, as the court acknowledged, the police department advised Mr. Perkins and his counsel of this "judicial remedy," but plaintiffs failed to pursue it *through the court system*. (Pet.App. A 5, E 3.) However, it is largely irrelevant whether or not plaintiffs were informed by the *police department* what their judicial remedies were--the judicial remedies are provided by law, and plaintiffs are presumed to know the law. *See*, *North Laramie Hand Co. v. Hoffman*, 268 U.S. 276, 283 (1925) ("All persons are charged with knowledge of the provisions of statutes and must take note of the procedure adopted by them; and when the procedure is not arbitrary there are no

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[7] The cases discussing the section 1536 procedures do not require that the applicant include the search warrant number. Nor is there any evidence that an application or motion was rejected or denied due to the absence of a search warrant number in this case. Plaintiffs simply ask the Court to assume that their hypothetical motion would have been denied since they did not have a search warrant number.

constitutional limitations relieving them from conforming to it.")

Second, the Court of Appeals references "a number of telephone calls [made by Mr. Perkins] to the city's police station . . . and a trip to the municipal court." (Pet.App. A 19.) From this premise, the court below simply concluded that the police department had a constitutional duty to inform plaintiffs of the *court's* procedures for obtaining the release of the property. (Pet.App. A 22 ["the notice must inform the recipient of the procedure for contesting the seizure or retention of the property taken"]). Unfortunately, the Court of Appeals' conclusion ignores the fact that a police department has no authority over how these judicial procedures operate. Nor does the police department have any control over how the local courts file or otherwise maintain their various cases. Furthermore, the Ninth Circuit's analysis has the practical effect of raising to constitutional dimensions every practical impediment (real or imagined) encountered by an unmotivated claimant.

III. THE NINTH CIRCUIT'S CREATION OF THIS "NOTICE" ELEMENT TO ASSESS THE ADEQUACY OF *POST DEPRIVATION* JUDICIAL AND STATUTORY REMEDIES NOT ONLY INTRUDES INTO STATES' AUTHORITY IN THE AREA OF LAW ENFORCEMENT, BUT IT ALSO PROMISES TO INTRUDE INTO OTHER AREAS WHICH HAVE TRADITIONALLY BEEN REGULATED BY THE STATES

The Ninth Circuit's use of the *Mathews v. Eldridge, supra,* analysis to create new "procedural" rights in the area of post-deprivation remedies is also inconsistent with this Court's continued efforts to prevent federal courts from converting the Fourteenth Amendment into "*a font of tort*

law to be superimposed upon whatever systems may already be administered by the States." *Parratt v. Taylor, supra,* 451 U.S. at 544, 101 S. Ct. at 1917. (*emphasis added*).

Understandably concerned with principles of comity and federalism, this Court has attempted to curtail efforts by federal courts to expand substantive and procedural rights under the Due Process Clause. Efforts to expand substantive rights under the Fourteenth Amendment were rebuked by this Court in *Graham v. Connor*, 490 U.S. 386, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989), and *Albright v. Oliver*, 510 U.S. 266, 114 S. Ct. 807, 127 L. Ed. 2d 114 (1994). In these decisions, this Court expressed concern over the constitutionalization of state law by the creation of additional "substantive" due process rights over and above those rights that are already protected under specific provisions of the Bill of Rights. 490 U.S. at 394-395, 109 S. Ct. at 1870-1871; 510 U.S. at 273-74, 114 S. Ct. at 813.

Similarly, this Court has rebuked efforts to expand procedural rights in cases such as *Parratt v. Taylor*, *supra*, and *Hudson v. Palmer*, *supra*, where a state has eliminated the need for federal protection by providing adequate post-deprivation judicial or statutory remedies. In *Parratt v. Taylor*, this Court relied on principles of comity and federalism to reject a prison inmate's argument that he had a right to predeprivation procedures even though the state provided an adequate tort remedy to compensate him for the loss of his property interest:

> To accept respondent's argument that the conduct of state officials in this case constituted a violation of the Fourteenth Amendment would necessarily result in turning every alleged injury which may have been inflicted by a state official . . . into a violation of the Fourteenth Amendment cognizable under § 1983. It is hard to perceive any logical stopping

> place to such a line of reasoning. Presumably, under this rationale any party who is involved in nothing more than an automobile accident with a state official could allege a constitutional violation under § 1983. Such reasoning "would make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States. (Citation)."

Id. at 544, 101 S. Ct. at 1917.

More recently, members of this Court in *Albright v. Oliver*, *supra*, recognized the importance of these principles. In *Albright v. Oliver*, justices Kennedy and Thomas found that the availability of an alternative state remedy for malicious prosecution precluded a claim under the Due Process Clause for initiation of criminal charges without probable cause, reasoning thus:

> The common sense teaching of *Parratt* is that some questions of property, contract, and tort law are best resolved by state legal systems without resort to the federal courts, even when a state actor is the alleged wrongdoer. As we explained in *Parratt*, the contrary approach 'would almost necessarily result in turning every alleged injury which may have been inflicted by a state official acting under 'color of law' into a violation of the Fourteenth Amendment cognizable under § 1983 . . . . The *Parratt* principle respects the delicate balance between state and federal courts and comports with the design of § 1983, a statute that reinforces a legal tradition in which protection for persons and their rights is afforded by common law and the laws of the states, as well as by the Constitution. (Citation.)

510 U.S. at 283, 114 S. Ct. at 818-19.

A. The Decision Below Further Complicates Section 1983 Liability For Damages In Property Cases, Especially Where There Is No Systemic Problem With The State's Corrective Process

In cases where the States have well established and adequate procedures, i.e., statutory and judicial remedies, for the return of seized property, those state procedures should not be displaced by federalized tort law under the guise of a section 1983 action. *Vicory v. Walton*, 721 F.2d 1062, 1063 (6th Cir. 1983), *cert. denied*, 469 U.S. 834 (1984) provides a persuasive analysis of the principles of comity and federalism that have informed this Court's efforts to contain efforts at constitutionalization of state law remedies. In *Vicory v. Walton*, plaintiffs, owners of a mobile trailer seized for purposes of a criminal investigation and trial, sued the City for retaining the trailer without due process of law. The Court of Appeals held that state tort remedies provided all the process that was due. *Id.* at 1065.

Foreshadowing this Court's decision in *Hudson v. Palmer*, *supra*, the Court of Appeals rejected plaintiffs' claim that the *Parratt* rule did not apply to "intentional" conduct. The court reasoned that "the principle being applied does not turn on the question of whether the claimed constitutional tort affecting property is caused by intentional conduct or negligent conduct," but reflects the Supreme Court's basic determination to limit federal hearings "in procedural due process cases that can be corrected in state court." *Id.* at 1065. Therefore,

> [s]o long as a state's damage remedies are not shown to be inadequate in theory or practice---that is, so long as there is no systemic problem with the state's corrective process---we see no purpose to be served by further complicating section 1983 liability

for damages in property cases by distinctions grounded in different types of intent, negligence and strict liability.

Similarly, in the present case, plaintiffs simply failed to present any evidence of a "systemic" problem with California's judicial remedy for the return of lawfully seized property. Rather, having obtained an unsuccessful judgment with regard to their various claims predicated under the Fourth Amendment, plaintiffs pursued an unalleged procedural due process claim rather than invoke the adequate state and judicially created remedies. Nonetheless, the Court of Appeals created a new procedural due process right to legal advice based on plaintiffs' inability (or unwillingness) in this single instance to obtain the necessary information and relief after one visit to the court. Even when plaintiffs retained counsel, no effort was made whatsoever to take the legal steps necessary to pursue this post-deprivation judicial remedy. (J.A. 70.)

In light of the foregoing decisions, it is unlikely that this Court intended the analysis set forth in *Mathews v. Eldridge*, *supra*, to be used to expand procedural rights where the only evidence of "inadequacy" of a post-deprivation judicial remedy is an aggrieved party's initial difficulty in pursuing the remedy in court. The creation of this new "notice" element to assess the adequacy of post-deprivation judicial and statutory remedies not only intrudes into state's authority in the area of law enforcement, but also promises to intrude into other areas which have traditionally been regulated by the states.

B. The Effects Of The Decision Below Are Far Reaching And Require Overly Burdensome Changes To Existing State Property Seizure Procedures Which Have Long Been Considered To Be Lawful

A municipality has no authority over court procedures governing the return of lawfully seized property, anymore than a municipality has control over the means through which a tort action can be prosecuted. Yet, in this particular case, the Ninth Circuit has imposed a burden on police departments to research court procedures--which may vary from time to time and from court to court--concerning the precise manner in which property obtained under a valid search warrant may be recovered. To avoid section 1983 liability, municipalities must fashion some sort of "notice" in the form of legal advice, continuously monitor court processes for any relevant changes in procedure, update the required legal advice to reflect any changes in the relevant court processes, and provide the necessary information after a deprivation has occurred but before an aggrieved party pursues the judicial remedy.

The Ninth Circuit's rationale for the *Perkins' notice* promises to pave the way for further federal intrusion into areas which traditionally have been relegated to the states. Indeed, it takes little imagination to predict the Ninth Circuit's next step, namely, to require public agencies--who have no authority or control over existing state law judicial and statutory remedies recognized in cases such as *Parratt v. Hudson*, *supra*, *Hudson v. Palmer*, *supra*, and numerous other circuit court decisions--to provide legal advice and guidance on invoking such remedies. In doing so, the newly created *Perkins notices* would also render several long established state statutory provisions regulating routine state property seizures constitutionally inadequate, necessitating their revision by the state legislature.

For example, it has long been recognized that when persons are arrested and incarcerated, their personal effects are "seized", inventoried and placed in official custody. *Hudson v. Palmer*, *supra*, 468 U.S. at 541, 104 S. Ct. at 3207 (Justice O'Conner concurring); *see also*, *Illinois v. LaFayette*, 462 U.S. 646, 103 S. Ct. 2609, 77 L. Ed. 2d 65 (1983). Moreover, law enforcement officers' entitlement to seize and preserve lawfully encountered physical evidence from persons has also been well established. *United States v. Edwards*, 415 U.S. 800, 809, 94 S. Ct. 1234, 1239, 39 L. Ed. 2d 771 (1974). In California, law enforcement personnel are authorized to seize and retain property from prisoners under Government Code section 26640 while Penal Code section 4403 requires that a receipt be issued to an arrested person for seized property. The available state remedy of mandamus is the established and appropriate remedy to compel the return of property seized under these sections. *Minsky v. City of Los Angeles*, (1974) 11 Cal. 3d 113, 520 P.2d 726.

The above seizures of property, otherwise considered lawful, will now have to be accompanied by a *Perkins' notice* informing the claimant of "the procedures for contesting the seizure or retention of the property taken, along with any additional information required for initiating that procedure in the appropriate court". (Pet.App. A 22.) Moreover, in accordance with the *Perkins notice*, an explanation of the "need for a written motion or request to the court stating why the property should be returned" must also be provided. (Id.). Applying the Ninth Circuit's analysis, any impediments encountered by unmotivated claimants would simply expand the constitutional obligations of the police. For example, not only could police officers be accused of the unauthorized practice of law, but state and local government entities could be sued for legal malpractice if the advice provided is incorrect, inaccurate, or otherwise construed as misleading.

Recognizing the unduly burdensome affects of this *Perkins'* type notice on state and local government resources, this Court should reject the requirements laid down by the court below.

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CONCLUSION

For the reasons hereinabove stated, the City of West Covina prays that the decision below, finding that the City deprived the plaintiffs of their procedural due process rights, be reversed and that it be awarded its costs.

Dated: July 13, 1998.

Respectfully submitted,

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